

REMARKS

Applicant has carefully studied the Office Action of January 29, 2004 and offers the following remarks in response thereto.

Initially, Applicant notes the objection to the drawings has been addressed. Applicant will submit new formal drawings upon claim allowance.

Claims 1, 4-8, and 14-17 were rejected under 35 U.S.C. § 102(e) as being anticipated by Erb et al. (hereinafter "Erb"). Applicant respectfully traverses. For the Patent Office to prove anticipation, the cited reference must show each and every claim element. Further, the elements of the reference must be arranged as claimed. MPEP § 2131. This is a strict standard which has not been met in this case for multiple reasons.

First, claim 14 depends from claim 11. Claim 11 was not rejected under 35 U.S.C. § 102(e). As claim 11 has not been rejected under § 102(e), it is improper to reject a claim which depends from claim 11 under § 102(e). This appears to be a typographical error on the part of the Patent Office because claim 14 is not addressed in the body of the § 102(e) rejection, but is addressed later in a § 103 rejection. However, to avoid confusion, Applicant requests withdrawal of the § 102(e) rejection of claim 14 at this time.

Second, the Patent Office misconstrues the second message type identifier recited in each of the independent claims 1, 7, and 15-17. The claim recites that the second message type identifier identifies a type of operations and management data requested from the switch. The Patent Office opines that the second message type identifier is disclosed at col. 8, lines 6-20 and col. 36, lines 13-27 of Erb. Applicant respectfully traverses this statement. Col. 8, lines 6-20 talks about step 134a, which is a message from the application 114 through interface 115 to database server 116 with a request to read a tuple. Step 135 discusses the actual reading of the database. This read command and its accompanying message described at step 134a is an interesting point, but the Patent Office has previously indicated that steps (called "items" by the Patent Office) 134a and 135 correspond to the first message type identifier (see Office Action, page 3, lines 10-11). The Patent Office cannot identify an element of the reference as two elements of the claim because then the elements of the reference are not arranged as claimed. To this extent, the first cited passage does not show the recited claim element. The second cited passage is a more detailed analysis of the items recited in the first passage. As these items have already been allocated to the first message type identifier, they cannot serve as the second

message type identifier. Thus, the Patent Office's analysis of the reference is incorrect, and the reference does not show the second message type identifier. If the Patent Office changes its construction of the reference such that items 134a/135 are only the second message type identifier, then Applicant reserves the right to address this new construction in a future response. However, Applicant preemptively points out that if items 134a/135 are the second message type identifier, there is nothing within these messages that can serve as the first message type identifier. This is addressed in further detail below in relation to the Patent Office's analysis of the first message type identifier.

Third, the Patent Office confuses the first and second message type identifiers. Specifically, the independent claims recite that the packet that is formed has two message type identifiers. Thus, for anticipation to be proven, the Patent Office must show where in the reference there is a single packet that has both message type identifiers. The Patent Office opines that items 134a, 135, 141a, and 142 are the first message type identifier. As discussed above, the Patent Office also uses items 134a/135 as the second message type identifier. This duplication is improper. Items 134a/135 can be one or the other, but not both. If 134a/135 are the first message type identifier, then the Patent Office has not shown the second message type identifier. If the Patent Office drops this construction and opines that items 134a/135 are the second message type identifier and that items 141a/142 the first message type identifier, then Applicant traverses on a different basis. Specifically, items 141a/142 deal with a write request to the database (see col. 8, lines 50-61). Items 141a/142 are different messages than items 134a/135. As items 141a/142 are part of a different message sequence than items 134a/135, they are clearly not part of the same packet. Since anticipation requires that the reference be arranged as claimed and the claim recites that a single packet has both message type identifiers, a reference which shows two separate messages cannot anticipate the claim because the reference is not arranged as claimed. Since the Patent Office has not shown how the reference is arranged as claimed, Applicant requests withdrawal of the § 102(e) rejection of independent claims 1, 7, and 15-17.

Fourth, Applicant further traverses the Patent Office's assertion that items 141a/142 disclose a message type identifier identifying a message contained at least partially within said packet as a data request message. Items 141a/142 are a write command message to the database. A write command cannot be construed as a data request message. Requesting data cannot be

equated with overwriting data within the database. Thus, the Patent Office's construction of the reference is incorrect and the rejection is not properly supported. Applicant requests withdrawal of the § 102(e) rejection of independent claims 1, 7, and 15-17 on this ground as well.

Dependent claims 4-6 and 8 are patentable at least for the same reasons that claim 1 is patentable, and Applicant requests withdrawal of the § 102(e) rejection of these claims at this time.

Claims 2, 3, 9, and 10 were rejected under 35 U.S.C. § 103 as being unpatentable over Erb in view of Rutkowski et al. (hereinafter "Rutkowski"). Applicant respectfully traverses. For the Patent Office to establish obviousness, the Patent Office must show where each and every claim element is located in the combination of references. MPEP § 2143.03. Further, before the Patent Office can combine the references, the Patent Office must advance a motivation to combine the references. The motivation to combine the references must be supported by actual evidence. *In re Dembiczak*, 175 F.3d 994, 999 (Fed. Cir. 1999).

As explained above, Erb alone does not show the two message type identifiers. Likewise, the Patent Office has identified nothing in Rutkowski which cures this deficiency. Since the references individually do not teach or suggest a claim element, the combination of references cannot teach or suggest the claim element and the rejection does not establish obviousness.

Further, while the Patent Office advances a motivation to combine the references, the Patent Office provides no actual evidence, and the references cannot be combined. Specifically, the Patent Office opines that the motivation to combine the references would be to authenticate a user requesting access to a system resource. However, this statement is not supported with the requisite evidence and is insufficient to combine the references. To this extent, the references stand alone and cannot be combined. As explained above, the references individually do not support the rejection and the claims are allowable. Applicant requests withdrawal of the § 103 rejection of claims 2, 3, 9, and 10 at this time.

Claims 11-14 were rejected under 35 U.S.C. § 103 as being unpatentable over Erb in view of Raymond et al. (hereinafter "Raymond"). Applicant respectfully traverses. The standard for obviousness is set forth above.

Initially, Applicant notes that while the Patent Office advanced a motivation to combine the references, the Patent Office did not support this motivation with the requisite actual

evidence. Specifically, the Patent Office opined that the motivation to combine the references would be to transmit lower priority information over a second connection to provide a dedicated path for ancillary information. This statement is not supported with any evidence and thus is insufficient to support the combination. Since the combination is improper, the references stand individually. The Patent Office admits that Erb does not teach the operations and management data having a second priority. Thus, Erb alone cannot render the claims obvious. Raymond does not teach sending operations and management data and thus, Raymond alone cannot render the claims obvious. Since the references individually cannot render the claim obvious and the combination is improper, the rejection of the claims is improper. Applicant requests withdrawal of the § 103 rejection of claims 11-14 at this time.

Second, even if the combination of Erb and Raymond is proper, the combination does not teach or suggest sending the operations and management data at two different priorities as recited in independent claim 11. Specifically, the combination of the references would send a disk image at a first priority and control messages at a second priority as taught by Raymond. Nothing suggests breaking apart a single class of messages into different priorities. Thus, absent a modification, the combination does not teach a claim element and cannot render the claims obvious. The Patent Office has given no reason to modify the combination, and it is improper to impute a motivation to modify a combination. If the Patent Office wishes to modify the combination, Applicant reserves the right to address this at a future time, but the combination of references does not teach or suggest the claimed invention. Applicant requests withdrawal of the § 103 rejection of claims 11-14 at this time.

Applicant requests reconsideration of the rejections in light of the arguments presented herein. The references of record are not properly combinable on the record presently before Applicant, and even if the references are combinable, the combination does not teach or suggest all the claim elements. Applicant earnestly solicits claim allowance at the Examiner's earliest convenience.

Respectfully submitted,

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